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November 6, 2003

Mr. Thomas N. Dorman
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40601

RE: Case No. 2001-00105

Dear Mr. Dorman:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of DIECA Communications, Inc., d/b/a Covad Communications Company, AT&T Communications of the South Central States, Inc., and MCImetro Access Transmission Services, Inc. Response to BellSouth's Motion to Modify SEEM Plan. Please indicate receipt of this filing by your office by placing a file stamp on the extra copy and returning to me the enclosed, self-addressed stamped envelope.

Sincerely,

C. Kent Hatfield
Counsel for
AT&T of the
South Central States, Inc.;
Covad Communication Company
and
MCImetro Access Transmission
Services, Inc.

CKH:jms

enc.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

2003

In the Matter of:

**INVESTIGATION CONCERNING THE)
PROPRIETARY OF INTERLATA SERVICES)
BY BELLSOUTH TELECOMMUNICATIONS,) **CASE NO. 2001-105**
INC., PURSUANT TO THE)
TELECOMMUNICATIONS ACT OF 1996)**

**RESPONSE OF COVAD, AT&T, and MCI TO BELLSOUTH'S
MOTION TO MODIFY SEEM PLAN**

DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"), AT&T Communications of the South Central States, Inc. ("AT&T"), and MCImetro Access Transmission Services, Inc. ("MCI") hereby submit this Response to the Motion of BellSouth Telecommunications, Inc. ("BellSouth") to Modify SEEM Plan ("BellSouth's Motion"), filed October 17, 2003. In its Motion, BellSouth asks the Commission to modify the Self-Effectuating Enforcement Mechanism ("SEEM") Plan to eliminate the requirement that BellSouth pay penalties related to line sharing because, allegedly, the Federal Communications Commission's ("FCC") recently-released Triennial Review Order eliminated line sharing as an unbundled element ("UNE") which must be offered by incumbent local exchange carriers (ILECs) such as BellSouth.

BellSouth's Motion should be denied for three reasons: 1) the Commission has jurisdiction over the SEEM Plan to protect Kentucky's citizens from anti-competitive behavior, including enforcement of BellSouth's 271 obligations; 2) BellSouth remains obligated to provide non-discriminatory access to line sharing both under the FCC's

Triennial Review Order¹ and the Telecommunications Act of 1996; and 3) excusing BellSouth from providing non-discriminatory access to line sharing under the SEEM Plan is against the public interest and the purpose of the SEEM Plan. For these reasons, this Commission should deny BellSouth's Motion.

I. The Purpose of the SEEM Plan is to Discourage Anti-Competitive Behavior, Encourage Fair and Effective Competition, and Enforce BellSouth's Section 271 Obligations.

BellSouth's Motion should be denied because – under applicable state law – there is a mandate to continue line sharing under the SEEM Plan for as long as BellSouth is required to provide line sharing. BellSouth's entire motion is based on the assertion that the SEEM Plan is narrowly tailored to enforce BellSouth's Section 251 obligations.² This is a dramatic misstatement of the law: The Commission's jurisdiction over the SEEM Plan is based on Kentucky law and the action of this Commission designed to ensure “that competition in Kentucky continues to thrive and grow,” to “expedite the resolution of future disputes,” and to ensure that BellSouth “maintains compliance with Section 271.” KPSC Advisory Opinion, Case 2001-105, Apr. 26, 2002, p. 7. In addition to discouraging anti-competitive behavior and encouraging fair and effective competition, the Commission adopted the SEEM Plan as a necessary step “to monitor BellSouth's performance and prevent backsliding” after BellSouth obtains authority to provide interLATA service. *Id.* at 9. Not only did the Commission adopt and implement the SEEM Plan, it also gave specific notice to BellSouth of the Commission's concern that

¹ Federal Communications Commission (“FCC”) released its *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC-03-36). *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, FCC 03-36 (rel. Aug. 21, 2003) (“Triennial Order”)

² BellSouth's Motion at ¶ 1 (Asserting that “line sharing is no longer an unbundled network element that incumbent LECs are required to offer pursuant to Section 251 of the Act. For this reason, BellSouth should be relieved of any further obligation to pay SEEM penalties that relate to the provision of line sharing.”).

“BellSouth’s line sharing policy may raise questions of competitive discrimination in the future.” *Id.* at 25.

In contravention of its own previous advocacy, BellSouth now attempts to avoid any relationship to its Section 271 obligations or the jurisdictional basis of the SEEM Plan. In its Motion, BellSouth asserts that “a measurement plan is simply a mechanism that can be utilized to ensure that an RBOC meets its obligations under 251.”³ The reason BellSouth feels obliged to divorce the SEEM Plan from enforcement of BellSouth’s Section 271 obligations and the Commission’s jurisdiction is because BellSouth remains obligated to provide non-discriminatory access to line sharing both under the Triennial Review Order and Section 271 of the Act. It would be premature, a violation of Section 271, and detrimental to Kentucky consumers and competition for this Commission to approve any discontinuance of the SEEM Plan for line sharing when BellSouth remains obligated to provide line sharing under the Act and the rules and regulations of the FCC.

II. BellSouth is Still Obligated to Provide Non-Discriminatory Access to Line Sharing Provisioning, Maintenance and Repair.

A. The Triennial Review Order requires BellSouth to continue providing access to Line Sharing.

BellSouth *only* provides access to line sharing because it has been and remains obligated to do so.⁴ Indeed, the FCC expressly outlined the Incumbent LECs’ (“ILECs”) continuing line sharing obligations in the Triennial Review Order: “In order to implement the line sharing transition plan described above, we find that it is necessary to

³ BellSouth’s Motion at ¶ 2.

⁴ BellSouth’s Motion at ¶¶ 6 and 7 (outlining the Triennial Review Order’s grandfathering of existing line sharing customers and the continuing availability of line sharing during a three (3) year transition period).

reinstate certain rules concerning the HFPL Incumbent LECs must condition loops to enable requesting carriers to access the HFPL incumbent LECs must provide physical loop test access points *on a nondiscriminatory basis* for the purpose of loop testing, maintenance, and repair activities.”⁵ Accordingly, BellSouth remains obligated to provision, maintain and repair line sharing on a non-discriminatory basis under the terms of the Triennial Review Order.

B. Section 271 of the Act also requires that BellSouth provide access to line sharing.

BellSouth is also obligated to provide access to line sharing under Section 271 of the Act. The FCC stated in the Triennial Review Order that “section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251 . . .”⁶ The FCC went on to state that “BOCs must continue to comply with any conditions required for approval consistent with changes in the law.”⁷ There can be no question that Section 271 checklist item number 4 requires the Regional Bell Operating Companies (“RBOCs”) to provide access to line sharing. Checklist item 4 requires the RBOCs to provide access to “local loop transmission from the central office to the customer’s premises, *unbundled from local switching or other services.*”⁸ The High Frequency Portion of the Loop (“HFPL”) is clearly a form of loop transmission – loop transmission that the RBOCs themselves routinely use to provide xDSL services separately from narrowband voice services.⁹ Indeed, in describing the HFPL in the *Line Sharing Order*, the FCC stated that “requesting carriers may access unbundled loop functionalities, such

⁵ Triennial Review Order at ¶ 268 (emphasis added).

⁶ Triennial Review Order at ¶ 659.

⁷ Triennial Review Order at ¶ 665.

⁸ See 47 U.S.C. § 271(c)(2)(B)(iv).

⁹ In other words, Bell customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services to their local loop.

as non-voiceband transmission frequencies, separate from other loop functions” – distinguishing the high frequency loop transmission path from the narrowband frequencies used for circuit switched voice services.¹⁰ Thus, in light of the clear statutory language in checklist item #4, there is no question that BellSouth and other RBOCs remain under a statutory obligation to offer unbundled HFPL loop transmission to competitors.

A long line of FCC Section 271 orders confirms the *continuing* obligation of RBOCs to offer unbundled access to HFPL loop transmission after Section 271 approval. Since the RBOCs first implemented access to line sharing, the FCC has consistently looked at the non-discriminatory availability of line sharing as part of its review of RBOC compliance with checklist item number 4.¹¹ To this day, months after its decision to eliminate the line sharing UNE, and even after the rules in the FCC’s *Triennial Review Order* have become effective, the FCC continues to look at the non-discriminatory availability of line sharing as an integral component of its checklist item 4 analysis in Section 271 proceedings¹² – even where the Section 271 application at issue was filed more than a month after the FCC voted to eliminate the line sharing UNE *and* the FCC Order granting the application was issued two weeks after the *Triennial Review Order*

¹⁰ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order in CC Docket No. 98-147 Fourth Report and Order in CC Docket No. 96-98, FCC 99-355, 14 FCC Rcd. 20912, 20923 at para. 18 (1999).

¹¹ See, e.g., *Joint Application by SBC Communications, Inc., et al., for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, paras. 214-219 (2001).

¹² See *Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota*, Memorandum Opinion and Order, WC Docket No. 03-90, FCC 03-142, para. 53, and App. C, paras. 50-51; *Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, WC Docket No. 03-138, FCC 03-228, paras. 133-143; and *Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin*, Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243, issued October 15, 2003, paras. 133-143.

became effective.¹³ In that Order, the FCC continued to consider non-discriminatory access to line sharing under checklist item number 4:

¶ 142: Based on the evidence in the record, we conclude, consistent with the state commissions, that SBC provides unbundled local loops in accordance with the requirements of section 271 and our rules. Our conclusion is based on our review of SBC's performance for all loop types, which include voice-grade loops, xDSL-capable loops, digital loops, and high capacity loops, as well as our review of SBC's processes for hot cut provisioning, and *line sharing* and line splitting.

¶ 145. *Line Sharing and Line Splitting*. Based on the evidence in the record, we find that SBC provides nondiscriminatory access to the high frequency portion of the loop (*line sharing*). SBC's performance data for line shared loops demonstrate that it is generally in compliance with the parity and benchmark measures established in the application states¹⁴

Manifestly then, non-discriminatory access to line sharing remains a requisite to Section 271 approval after the Triennial Review Order, and consequently, a requisite to compliance with Section 271 "back-sliding" provisions.¹⁵ Despite a change in the law relied upon by BellSouth, BellSouth remains under a continuing obligation under Section 271 of the Act to provide non-discriminatory access to line sharing.

III. Because BellSouth Remains Obligated to Provide Non-Discriminatory Access to Line Sharing, the SEEM Plan Should Continue to Enforce that Obligation.

In accordance with the purposes of the SEEM Plan and the continuing obligation of BellSouth to provide non-discriminatory access to line sharing, BellSouth's Motion should be denied. It is strongly in the public interest that the customers of Covad, AT&T, MCI, and other CLECs are protected from discriminatory treatment by BellSouth. What BellSouth is really asking this Commission to do is grant BellSouth unfettered discretion to treat line sharing customers of CLECs in any manner it sees fit. If such discretion were responsibly handled by the RBOCs and other monopolists in the past, the Sherman

¹³ See *id.* at para. 1.

¹⁴ *Id.* (emphasis added).

¹⁵ TRO ¶¶ 659 and 665.

Act, the Modified Final Judgment, the Act and the SEEM Plan would all be unnecessary. The SEEM plan is necessary for the very reasons that underlie the Commission's jurisdiction: discouraging anti-competitive behavior and encouraging fair and effective competition. It is also an integral part of the Section 271 requirements that allow BellSouth to compete in the arena of interLATA telecommunication services. As long as BellSouth is obligated to provide parity treatment to its competitors and its competitors' customers, plans like the SEEM Plan are required to enforce that obligation.

IV. Conclusion

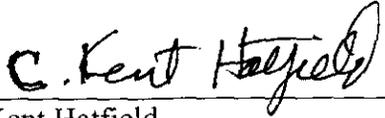
For the reasons set-forth in this Response, BellSouth's Motion to Modify the SEEM Plan to relieve it of any penalties for discriminatory treatment of line sharing customers should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to BellSouth's Motion to Modify SEEM Plan has been served by U.S. Mail this 6th day of November, 2003:

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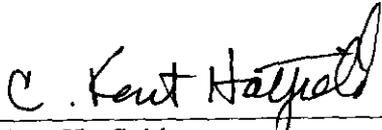
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